In the United States, Chief Justice, afterwards Chancellor, Kent, in the leading case of *Clarke v. Morey*,[17] extended the doctrine of *Wells v. Williams* to the conclusion that an alien enemy who comes and resides here, even without a safe conduct or license, is entitled to sue until ordered away by the President; and this, too, although the party is not known by the Government to have his residence in the United States. License is implied from his being suffered to remain. This would seem to be the rule most consistent with enlightened practice.

The English "Trading with the Enemy" proclamation of September 9, 1914 (sec. 3), expressly, and the recently enacted United States "Trading with the Enemy" Act of October 6, 1917 (sec. 2), by implication, exclude from the definition "alien enemy" a person not resident or carrying on business within the territory of the enemy country.

Inasmuch as, in law, the declaration of war makes enemies of all the respective subjects of the belligerents, Vice Chancellor Lane's attempt in the principal case to translate into a legal distinction the political distinction made by the President between the German Government and the German people cannot be supported. It is submitted that the German stockholders, as alien enemies resident in the enemy state, should have been non-suited.

The question as to whether the national character of the American corporation is affected by the majority German stock ownership is discussed in the COMMENT following.

E. M. B.

IS AN AMERICAN CORPORATION SUBSTANTIALLY OWNED BY GERMAN STOCKHOLDERS AN ALIEN ENEMY?

This complex problem was recently submitted to an American court in the case of *Fritz Schultz Jr. Co. v. Raimes & Co.* (1917, N. Y. Sup. Ct.) 166 N. Y. Supp. 567. There is thus raised, at a very early stage of our participation in the Great War, the question adjudicated in England in the celebrated *Daimler* case (*infra*).

There are no internationally accepted rules in existence with respect to the nationality and domicil of corporate bodies. Both concepts, nationality and domicil, can be applied to corporations

[17] (1813, N. Y.) 10 Johns 69.

in a metaphorical sense only.[1] The privileges and duties incidental to allegiance and the "animus" necessary to domicil cannot be ascribed to corporate bodies. Nevertheless, the determination of questions of taxation and jurisdiction with respect to corporations has necessitated adjudications upon the question of their nationality and domicil. In England it has been held that for purposes of the provisions of the income tax law the domicil (more accurately "residence") of a company is at the place where its center of administration, the controlling brain, is located.[2] For purposes of jurisdiction, the "domicil" has been construed to be the place where it has a registered office,[3] and there may indeed be two such "domicils."[4] In the United States, the "fiction theory" of the corporate entity has served to impute to a corporation, for jurisdictional purposes, the citizenship of the

---

[1] Foote, *Private International Jurisprudence,* (4th ed.) 143 *et seq.* Volumes have been written, particularly on the continent, on the debatable question of the nationality of corporations. The various theories are well summarized in the work of E. Hilton Young, *Foreign Companies and other Corporations,* Cambridge, 1912, 110-168. See also, Mamelok, *Die juristische Person in internationalen Privatrecht,* Zurich, 1900, 211 *et seq.* Schwandt, *Die deutschen Aktiengesellschaften,* Marburg, 1912, pp. 25-75; Pillet, *Des Personnes Morales en Droit Int. Privé,* Paris, 1914; Isay, *Die Staatsangehörigkeit der juristischen Personen,* Tübingen, 1907, in which the legislative systems of the various countries are outlined (pp. 214-224); Levin, M., *De la nationalité des sociétés et ses effets juridiques,* Paris, 1900, p. 199 *et seq.;* Fromageot, H., *De la double nationalité des individus et des sociétés,* Paris, 1892, pp. 114-121; Lyon-Caen in 12 Clunet (1885) 265-274; Lainé in 20 *Clunet* (1893) 273 *et seq.;* Arminjon in *4 Rev. de droit int.* n. s. (1902) 381 *et seq.,* translated into English by William E. Spear, Clerk, Spanish Treaty Claims Com., Washington, 1907, Document 53; Marais and Barclay in 23rd Report, *International Law Assn.* (1906) 360-372; Jacobi in 27th Rep. *ibid.,* 368-380; Baumgarten in 28th Rep. *ibid.,* 246-254. The various theories relating to the nationality of corporations are summarized in Borchard, *Diplomatic Protection of Citizens Abroad,* 617-618.

[2] *Calcutta Jute Mills v. Nicholson* (1876) 1 Ex. D. 428. *De Beers Cons. Mines v. Howe* (C. A.) [1905] 2 K. B. 612; [1906] A. C. 455. *Goerz v. Bell* [1904] 2 K. B. 136; *Mitchell v. Egyptian Hotels, Ltd.* [1915] A. C. 1022, 1037; *San Paulo Ry. Co. v. Carter* [1896] A. C. 31. See an excellent article by *E. J. Schuster* in (1917) Papers read before the Grotius Society, vol. II, p. 57.

[3] *Keynsham, etc., Co. v. Baker* (1863, Ex.) 2 H. & C. 729.

[4] *Carron Iron Co. v. Maclaren* (1855) 5 H. L. C. 416, 449 and analysis of that case by Prof. Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1910) 10 COLUMBIA L. REV. 319.

state in which it was incorporated,[5] although this conclusion was subsequently rested upon the further fiction that there is merely "an indisputable legal presumption that a state corporation . . . is composed of the citizens of the state which created it."[6]

The persuasiveness and apparent simplicity of the "fiction theory" of the corporation have led the English courts to hold that the nationality of a corporation is to be deemed that of the country in which it was incorporated, regardless of its center of administration,[7] and, most curiously, regardless of the fact that for *belligerent* purposes domicil, and not nationality, is the test of enemy character.[8] Consistently with this theory they have declined to investigate the nationality of the stockholders, as a matter which could not affect the nationality of the corporation.[9] Lord Macnaghten in the *Janson* case (arising out of the Boer war), in which a company incorporated in the Transvaal was largely owned by British stockholders, stated:

> "If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien."[10]

---

[5] *Louisville, Cinci., etc., R. R. v. Letson* (1844, U. S.) 2 How. 497, 555. This is the theory followed by Lehman J. in the principal case in deciding that the New Jersey corporation had the right to sue.

[6] *St. Louis and San Francisco Ry. v. James* (1896) 161 U. S. 545, 562.

[7] *Attorney General v. Jewish, etc., Assn.* [1900] 2 Q. B. 556; [1901] 1 Q. B. 123.

[8] *Amorduct Mfg. Co. v. Defries* (1915) 84 L. J. K. B. 586; *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484. *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (But see notes 12-14.)

[9] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484; *Amorduct Mfg. Co. v. Defries, supra. The Roumanian* [1915] P. 26. In the matter of ownership of British ships (under the Merchant Shipping Act)—such ships cannot be owned by aliens—the courts until recently adhered to the fiction theory of the corporate entity. *Queen v. Arnaud* (1846) 16 L. J. Q. B. (n. s.) 50. (Lord Denman, C. J.: "In no legal sense are the individual members [of the corporation] the owners.") Recently, however, they have in this matter refused to be bound by the mere incorporation in England as conferring British nationality upon a corporation (and thus upon a ship) substantially owned by alien (German) stockholders, where the ship was under the control of the alien owners. *The Polzeath* [1916] P. 117 (C. A.) 241; *Dictum* in *The Tommi* [1914] P. 251. Compare, in the United States, *Hastings v. Anacortes Packing Co.* (1902) 29 Wash. 224.

[10] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484, 497.

The principle was carried to its logical, if somewhat startling, conclusion by the Court of Appeal in the *Daimler* case,[11] in which Lord Reading held that a company incorporated in England, only one of whose 25,000 shares was owned by a British subject, the balance being owned in Germany, was a British company and entitled to sue in a British court.[12] This decision was reversed in the House of Lords[13] on another ground, so that the opinions of the law lords on the question of the nationality of the plaintiff company are *dicta* only. Nevertheless, they will carry great weight by reason of the authority of the judges delivering them. Of the eight judges, two (Lord Shaw and Lord Parmoor) followed Lord Reading's decision in the Court of Appeal, although Lord Parmoor would, on evidence that the business of the company was carried on in an enemy country, have held otherwise. The Earl of Halsbury took the view that the company had an enemy character if the whole or a large part of its capital were owned by persons residing or doing business in Germany. He was the only one of the fourteen judges who sat in the two appellate courts who, it is submitted, consciously declined to be misled by the fiction theory, but concluded that a corporation was merely a form of association, analogous to a partnership, to enable human beings to do business and enjoy their property.[14]

---

[11] *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (Four of the justices concurred, Buckley, L. J., now Lord Wrenbury, alone dissenting on what would seem intuitive rather than legal grounds.)

[12] The decision was substantially aided by the Trading with the Enemy Proclamation of Sept. 9, 1914, which provides (§3) that "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." A less restrictive but similar provision is included in the United States Trading with the Enemy Act of October 6, 1917 (§2a). Although the British Proclamation substitutes nationality for domicil in determining enemy character, it is proper to recall that in Anglo-American law the nationality and domicil of corporations are usually considered identical. Subsequent British Orders in Council and the Trading with the Enemy Amendment Act, 1916 (5 and 6 Geo. V, c. 105) have extended the prohibition of trading with the enemy very widely to include those having "enemy association" (which has been construed by the political department of the Government to include firms even in neutral countries having German sympathies, connections or trade relations) and give the Board of Trade wide powers to wind up British concerns with such association. See Frank Evans: Trading with the Enemy Amendment Act, 1916 (1916) 32 LAW QUAR. REV., 249.

[13] [1916] 2 A. C. 307.

[14] An able analysis of the fiction theory of the "corporate entity" showing its true relations to legal realities is to be found in an article by

The opinions of the other judges, as expressed by Lord Parker, while purporting to uphold the legal entity theory, in fact laid particular emphasis upon the actual control and directing center of management as the determining factor in reaching a conclusion as to enemy character; and on this point, while the nationality of the shareholders could not affect the nationality of the company, they considered the character of the stockholders material to the question whether the control of the company's business was in fact vested in persons adhering to or under the control of enemies.[15]

While unwilling to modify in any way the corporate entity theory, Lehman, J., in the principal case, nevertheless adopted so much of Lord Parker's *dictum* as touched upon the question of "control" of the corporation by persons resident in an enemy country or adhering to the enemy, concluding that inasmuch as three of the four directors, including the manager, were residents of this country, the company was not under the "control" of alien enemies.[16] Thus, by the organization of subsidiary companies, with local directors in ostensible control, it would seem possible for large corporations doing an international business, to minimize the effects of an eventual taint of enemy character—a result created by the courts through their hesitation in piercing the corporate veil.

In conclusion, it may be observed that International Claims Commissions have almost uniformly adopted the rule, for purposes of jurisdiction, that the nationality of corporations is that of their country of incorporation, although the Department of

---

Professor Wesley N. Hohfeld: Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 COLUMBIA L. REV. 285, 288 *et seq.* For cases in which the "fiction theory" (under statutory construction) has been discarded see the Australian cases of *Osborne v. The Commonwealth* (1911) 12 Commonw. L. R. 321, 365; and *Morgan v. Deputy Federal Comm.* (1912) 15 Commonw. L. R. 661. A leading extreme case supporting the corporate entity theory is that of *Salomon v. Salomon & Co.* [1897] A. C. 22.

[15] [1916] 2 A. C. 307, 344. Story, J., in the case of *Society etc. v. Wheeler* (1814, U. S. C. C., N. H.) 2 Gall. 105, a case much misunderstood, really decided that the courts could determine the character of the British corporation from the character, enemy or friendly, of its members.

[16] It should be observed that in England, one-third stock ownership in an English company by subjects of the enemy suffices to give the Board of Trade supervision of its affairs, and some similar rule will undoubtedly be adopted by the Alien Property Custodian in the United States. A recent newspaper report mentioned 52% stock membership in Germany as the minimum.

State, acting administratively, always seeks, before extending protection to American corporations abroad, to establish the fact that the substantial beneficial ownership of the company is vested in American stockholders.[17]

CONFLICT OF LAWS IN WORKMEN'S COMPENSATION LEGISLATION.

A recent Connecticut case involves problems in the conflict of laws that are at once of compelling theoretical interest and of great practical importance. An employee under a Massachusetts contract was injured in Connecticut while at work within the scope of his employment. Under the decision of the Supreme Judicial Court of Massachusetts in *Gould's Case*[1], in accordance with the court's conclusion as to legislative intent, the Workmen's Compensation Act of Massachusetts has no application to an injury occurring outside of that jurisdiction. In an action brought in Connecticut recovery was allowed under the statute of the latter state. *Douthwright v. Champlin* (1917) 91 Conn. 524; 100 Atl. 97.

Such a result would have been reached without difficulty under the authority of *Gould's Case, supra.* This case, mainly on considerations applicable to the law of torts generally, while deciding that the Massachusetts act did not apply to extraterritorial injuries, expressly stated that it did apply to all intraterritorial injuries irrespective of the place of the contract. The court gave full effect to the presumption that a legislative act designed partially to supersede a particular branch of the law of torts is coextensive in application with the law thus superseded.[2] The fact that this dominant purpose was effected by reading certain unexpressed terms into certain contracts of employment was deemed not to affect this presumption. The rule of conflict of laws applicable to torts generally,[3] and not that applicable to contracts, was therefore consistently applied.

---

[17] Borchard, *op. cit.*, pp. 620-626.

[1] (1913) 215 Mass. 480, 102 N. E. 693. Accord, *Tomalin v. Pearson* [1909] 2 K. B. 61; *Schwartz v. India Rubber, etc. Co.* [1912] 2 K. B. 299. Applying the principle of *Gould's Case* to the question of waiver of common law rights are *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 620; *Piatt v. Smith* (1915) 188 Mo. App. 584, 176 S. W. 434; *Pendar v. H. & B. Mach. Co.* (1913) 35 R. I. 321, 87 Atl. 1.

[2] *Gould's Case, supra,* 487.

[3] See cases cited in *Gould's Case,* 487; and compare the very important case of *Brown v. Western Union Tel. Co.* (1914) 234 U. S. 542, 547, 34 Sup. Ct. 955, 956.